Mohd Harmizi bin Che Arifin v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–185 OF 2008

B

SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA

3 MAY 2010

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Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a), (2) — Trafficking in 937g cannabis — Appeal against conviction and sentence — Possession of dangerous drugs, whether established — Whether prima facie case of trafficking established — Whether conviction and sentence safe

D

Criminal Procedure — Appeal — Fact, finding of — Appeal against trial judge's findings of fact — Whether appellate interference warranted

E

Criminal Procedure — Trial — Defence — Failure to put defence to appropriate prosecution witness — Effect on defence

F

Evidence — Circumstantial evidence — Inferences from facts — Conduct of accused — Whether conduct of accused influenced by facts in issue — Whether onus on accused to explain conduct — Evidence Act 1950 s 8

Acting on information received, a police team led by SP6 raided a house. On entering the house SP6 identified himself as a police officer, whereupon the appellant rushed into a room, took out two slabs from underneath a bed and then dashed out with the two slabs held in each of his hands. The appellant then put up a struggle with members of the police team, but was overpowered and arrested. Later that same night, SP7 came by the appellant's house and was arrested by the police team. Two 'Eramin' pills were found in SP7's trousers pocket. SP7 was later charged, convicted and fined for possession of those pills. The two slabs seized from the appellant were subsequently confirmed to contain 937g of cannabis. The appellant was charged, convicted and sentenced to death in the High Court for trafficking in dangerous drugs, contrary to provisions of the Dangerous Drugs Act 1952 ('the DDA'). He appealed to the Court of Appeal. On appeal, counsel submitted that the prosecution had failed to establish a prima facie case of trafficking against the appellant. Counsel also argued that there was a gap in the prosecution's case due to its failure to call the appellant's mother to testify. The appellant's mother was in the house when it

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was raided by SP6 and his team and the failure to call her disproved the appellant's exclusive possession of the cannabis, counsel submitted.

Held, dismissing the appeal:

(1) On the facts, it was clear that the appellant had in his custody or under his control the two slabs of cannabis. The trial judge was also correct to conclude that the appellant knew that the two slabs contained dangerous drugs. The evidence adduced by the prosecution established the nexus between the conduct of the appellant and the two slabs of the drugs which were in his custody and under his control. His conduct was influenced by the fact in issue. There was no basis for the court to find that the conduct of the appellant in trying to dispose of the cannabis was to protect his mother. The onus was on the appellant to explain his reactions upon being aware of the presence of the police in the house (see paras 11 & 13); *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 followed; *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 distinguished.

(2) The trial judge was right to conclude that the appellant had possession of the drugs and rightly invoked the presumption of trafficking under s 37(da) of the DDA, since the cannabis was more than 200g. The evidence against the appellant at the close of the prosecution was sufficient to convict him had he elected to remain silent. The trial judge was therefore right in holding that the prosecution had established a prima facie case of trafficking against the appellant, and in calling upon him to enter on his defence (see para 15); *Warner v Metropolitan Police Commission* [1968] 2 All ER 356 referred; *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1 referred.

(3) The appellant's defence was that the two slabs of cannabis were not his and instead belonged to SP7 who had left them when he slept in the appellant's house previously. Although this defence was put to SP6 during cross-examination, it was not put to SP7. Although a court may view with suspicion a defence which was not put to the appropriate prosecution witness, the court is still bound to consider the defence, however weak and to acquit if not satisfied that the prosecution had discharged the burden of proof which rested upon it. This was the approach that the trial judge had undertaken and there was no misdirection in reaching his conclusion on the appellant's defence (see paras 18–19); *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 referred.

(4) The trial judge had adequately considered the appellant's defence. His finding that the prosecution had proven its case against the appellant beyond reasonable doubt was based upon findings of fact dependent on the credibility of the witnesses, against which the Court of Appeal was

reluctant to interfere with. The conviction of the appellant was safe and the appeal ought to be dismissed. Conviction and sentence affirmed (see paras 21–22); *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 referred; *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 referred.

[Bahasa Malaysia summary

Bertindak atas maklumat yang diberikan, sepasukan polis diketuai SP6 menyerbu sebuah rumah. Ketika memasuki rumah tersebut SP6 memperkenalkan dirinya sebagai pegawai polis, lalu perayu terus memasuki sebuah bilik, mengeluarkan dua kepingan dari bawah tilam dan kemudian terus meluru keluar dengan kedua-dua kepingan dalam kedua-dua tangannya. Perayu kemudian bergelut dengan anggota polis tetapi kemudiannya ditundukkan dan ditangkap. Kemudiannya pada malam yang sama, SP7 datang ke rumah perayu dan ditangkap oleh kumpulan polis tersebut. Dua pil 'Eramin' dijumpai dalam poket seluar SP7. SP7 kemudian dituduh, disabitkan dan didenda kerana memiliki pil-pil tersebut. Dua kepingan yang dirampas daripada perayu kemudian disahkan mengandungi 937g kanabis. Perayu dituduh, disabitkan dan dihukum dengan hukuman mati di Mahkamah Tinggi kerana mengedar dadah berbahaya, berikutan peruntukan Akta Dadah Berbahaya 1952 ('ADB'). Dia merayu ke Mahkamah Rayuan. Dalam rayuan, peguam menghujah bahawa pendakwaan gagal membuktikan kes prima facie pengedaran terhadap perayu. Peguam juga menghujah bahawa terdapat jurang dalam kes pendakwaan disebabkan kegagalannya memanggil ibu perayu untuk memberi keterangan. Ibu perayu berada dalam rumah tersebut semasa serbuan oleh SP6 dan pasukannya dilakukan dan menurut hujahan peguam, kegagalan memanggil ibunya tidak dapat membuktikan milikan eksklusif perayu ke atas kanabis tersebut.

Diputuskan, menolak rayuan:

(1) Daripada fakta, adalah jelas bahawa perayu memiliki dalam jagaannya atau dalam kawalannya dua kepingan kanabis. Hakim bicara juga tepat apabila memutuskan bahawa perayu maklum bahawa dua kepingan tersebut mengandungi dadah berbahaya. Keterangan yang dikemukakan oleh pendakwaan membuktikan hubung kait antara perbuatan perayu dan dua kepingan dadah tersebut yang mana berada dalam jagaan dan kawalannya. Perilakunya dipengaruhi oleh fakta-fakta yang menjadi isu. Tiada asas bagi mahkamah untuk memutuskan bahawa perilaku perayu yang cuba membuang kanabis tersebut adalah untuk melindungi ibunya. Beban adalah ke atas perayu untuk menjelaskan reaksinya apabila dia tahu tentang kehadiran polis dalam rumah tersebut (lihat perenggan 11 & 13); *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 diikut; *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 dibeza.

(2) Hakim bicara adalah tepat apabila memutuskan bahawa perayu memiliki dadah tersebut dan dengan tepatnya menggunapakai anggapan pengedaran di bawah s 37(da) ADB, kerana kanabis itu melebihi 200g. Keterangan terhadap perayu pada penutup kes pendakwaan adalah mencukupi untuk mensabitkannya dan dia memilih untuk berdiam diri. Oleh itu hakim bicara adalah betul apabila memutuskan bahawa pendakwaan telah membuktikan kes prima facie pengedaran terhadap perayu dan memerintahkannya membela diri (lihat perenggan 15); *Warner v Metropolitan Police Commission* [1968] 2 All ER 356 dirujuk; *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1 dirujuk.

(3) Pembelaan perayu ialah dua kepingan kanabis tersebut bukanlah miliknya tetapi kepunyaan SP7 yang telah meninggalkan mereka apabila dia tidur di rumah perayu sebelum itu. Walaupun pembelaan ini ditujukan kepada SP6 semasa pemeriksaan balas tetapi tidak ditujukan kepada SP7. Walaupun mahkamah mungkin meragui/mensyaki pembelaan yang tidak ditujukan kepada saksi pendakwaan yang betul, mahkamah masih harus mempertimbangkan pembelaan itu, walaupun lemah dan untuk membebaskan jika tidak berpuashati bahawa pendakwaan telah melepaskan beban pembuktian yang terletak padanya. Ini adalah pendekatan yang diambil oleh hakim bicara dan tiada salah arah dalam mencapai keputusan beliau atas pembelaan perayu (lihat perenggan 18–19); *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 diikut.

(4) Hakim bicara telah mempertimbangkan dengan mencukupi pembelaan perayu. Keputusannya bahawa pendakwaan telah membuktikan kesnya terhadap perayu melampaui keraguan munasabah adalah berdasarkan penemuan-penemuan fakta bersandarkan kepada kredibiliti saksi-saksi, yang mana Mahkamah Rayuan tidak mahu mengganggu. Sabitan perayu adalah kekal dan rayuan harus ditolak. Sabitan dan hukuman disahkan (lihat perenggan 21–22); *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 dirujuk; *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 dirujuk.]

Notes

For cases on defence, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4729–4735.

For cases on fact, finding of, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 395–469.

For cases on inferences from facts, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 707–712.

For cases on s 39B(1)(a), (2) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 447–489.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1; [1993] 4 CLJ 1, SC (distd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
Andy bin Bagindah v PP [2000] 3 MLJ 644, CA (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC
Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 3 CLJ 1, SC (distd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (folld)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Denish Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209, FC (refd)
Warner v Metropolitan Police Commission [1968] 2 All ER 356, HC (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 37(da)

Appeal from: Arrest Case No 45–5 of 2006 (High Court, Shah Alam).

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Suzana bt Atan (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Ahmad Maarop JCA:

INTRODUCTION

[1] In this case, the appellant, upon being aware of the sudden presence of the police in his house, rushed into his room, took out two slabs of cannabis from underneath his bed and then dashed out of the room holding the two slabs in each of his hands. He was arrested by the police after a struggle in the course of which the two slabs dropped on the floor. The appellant was charged with trafficking in 937g of cannabis, a dangerous drugs, under the Dangerous Drugs Act 1952 ('the DDA'). The High Court convicted him and sentenced him to death. He appealed to us. The issue raised in this appeal is whether the prosecution had proved a prima facie case of trafficking against the appellant.

BRIEF FACTS

[2] The prosecution's case in substance is as follows. On 2 August 2005 at about 7.15pm, acting on information received, Chief Inspector Loi Yew Lick ('SP6') led a team of nine police personnel including D/Cpl Mokhtar Abdul Ghani ('SP8') to house Lot No 4714, Kg Mahkota, Jalan Sg Tua, Selayang, Selangor ('the house'). When they arrived at the house (shown in photograph P5A & B at p 301, Vol 11 of the appeal record), they found that the front grille door was open but the wooden front door was closed. SP6 knocked at the door

but nobody opened it. SP6 turned the door knob and found it to be unlocked. SP6 opened the door to enter the house. Upon opening the door SP6 saw a man ('the appellant') clad only in a towel standing in the living room. SP6 was then about 5–7 metres from the appellant. At that time SP6 also noticed a woman ('the appellant's mother') and a small boy (*budak lelaki kecil*) in the living room watching television. When SP6 shouted that he was a police officer, the appellant rushed into a room (room No 2) in the house. The police party led by SP6 followed him. In the room SP6 saw the appellant bend down near a bed and took out two packages from underneath the bed. Then the appellant got up and rushed out of the room holding the two packages in each hand. The appellant was stopped in his track by SP6 and the police team and a struggle ensued. In the course of the struggle, the towel worn by the appellant loosened from his waist and he was then naked. The two packages which were held by the appellant in each of his hands dropped on the floor. The appellant was then overpowered and arrested. SP6 picked up the two packages and examined them. SP6 found each of them to contain a slab of compact plant material suspected to be cannabis. The house was searched but no other contraband was found. Later the same night, a man came to the house driving a car. He parked his car near the compound of the house. That man (later identified as Yusri Mat Zaib ('SP7')) was arrested by the police team. Upon being searched by the police, two 'Eramin 5' pills were found in his trousers' pocket. The two slabs of the compact plant material seized by SP6 were sent to the chemist, Wan Rahimah bt Wan Ahmad ('SP4'). She confirmed that the two slabs contained 937g of cannabis, a dangerous drugs under the DDA.

[3] At the trial in the court below, in the cross-examination of SP6 it was put to him that the slabs of two compact plant materials belonged to SP7 who would come to the house that night to collect them. It was put to SP6 that SP7 had left the two slabs in the house when he came and slept in the house the night before the appellant was arrested. In his evidence, SP7 testified that in August 2005, he resided at an apartment in Desa View Tower, Wangsa Maju. Before moving to Wangsa Maju, SP7 stayed with his mother in Kg Bendahara, Batu Caves. It was while staying in Kg Bendahara, Batu Caves that SP7 got to know the appellant. The appellant stayed at Kg Sg Tua, Batu Caves. SP7 and the appellant attended the same school — SRK Sg Tua, Batu Caves. However, they seldom met. According to SP7, the last time he met the appellant was three weeks before 2 August 2005 at an eating shop near the appellant's house. At that meeting in the course of their conversation, SP7 asked the appellant whether there was any opportunity for an employment. They also exchanged the numbers of their mobile phones. According to SP7, on 2 August 2005 at about 7pm he was at his apartment in Wangsa Maju when the appellant telephoned him. The appellant informed him that there was a job opportunity. The appellant did not tell SP7 what the job was. SP7 told the appellant that he would go to his mother's house at Kg Bendahara and that he would then call the appellant so that they could meet somewhere. After having his bath, SP7 left

his apartment in motorcar No JBT 6300. On the way SP7 contacted the appellant. The appellant told SP7 to come to his house. SP7 informed the appellant that he was on the way to his mother's house at Kg Bendahara and that he would stop by at the appellant's house. At about 9pm, SP7 arrived at the compound of the appellant's house and parked his car about 10 meters from the house. There, he was arrested by the police. The police found two 'Eramin 5' pills from his trousers' pocket. SP7 was then taken to his house by the police. Upon searching SP7's house, the police found no contraband therein. SP7 testified that he had nothing to do with the drugs found in the appellant's house. SP7 said he had no knowledge of that drugs. SP7 said he had never seen that drugs. SP7 admitted that in respect of the two 'Eramin 5' pills found on him, he was remanded for 14 days and subsequently fined RM2,700 by the magistrates' court. According to SP7, the two pills were bought by him at Chow Kit. He had wanted to use the pills at the disco which he intended to go to that night. According to SP7, before 2 August 2005 he had never gone to the appellant's house. He said he had never slept in the appellant's house.

[4] We find that although in the cross-examination of SP6, it was put to him that the two slabs of compact plant material belonged to SP7 and that SP7 would come to the house to collect them, the same challenge was not put to SP7 when he was cross-examined. We will discuss the implication of this failure later when we discuss the appellant's defence.

[5] At the close of the case for the prosecution, the learned trial judge held that the appellant had custody and control of the two slabs of compact plant materials containing the proscribed drug and that he knew the nature of the drugs. Therefore, on the strength of the evidence adduced by the prosecution, the learned trial judge found as a fact that the appellant had actual possession of the proscribed drugs. As the weight of the cannabis was more than 200g he invoked the presumption of trafficking under s 37(da) of the DDA. Being thus satisfied that the prosecution had proved a prima facie against the appellant, the learned trial judge called upon the latter to enter on his defence.

THE APPEAL

[6] Before us learned counsel for the appellant submitted that it was wrong for the defence to be called because based on evidence adduced at the end of the case for the prosecution, it could not be said that the prosecution had made out a prima facie case according to the standard enunciated in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 which carried the following words:

> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of

necessity, require a consideration of existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

[7] Learned counsel argued that no prima facie case of trafficking was established against the appellant because the prosecution did not call his mother, Puan Halijah Wadud to give evidence. Learned counsel contended that without Puan Halijah's evidence, there was a gap in the prosecution's case in that exclusive possession of the proscribed drugs was not proved by the prosecution. According to learned counsel, that was so because the room where the drugs was found was not locked and Puan Halijah was in the living room where the appellant was seen standing when the police entered the house. Learned counsel pointed out that the appellant's father ('SP5') was called to give evidence and SP5 said that he had nothing to do with the appellant's drug case. Thus, according to learned counsel, the appellant's father was excluded. Learned counsel then argued that to prove exclusive possession, the prosecution must call Puan Halijah to testify to eliminate her possible connection with and culpability for the proscribed drugs. He submitted that the failure to exclude Puan Halijah had resulted in a gap in the prosecution's case. He argued that the following inferences could be drawn from such a failure:

(a) the appellant alone was in possession of the cannabis; or

(b) the appellant and his mother were in joint possession of the cannabis; or

(c) the appellant's mother alone was in possession of the cannabis.

[8] Continuing his submission, learned counsel conceded that the room where the cannabis was found was the appellant's. Referring to the evidence adduced by the prosecution that there was a struggle in the room to the extent that the towel worn by the appellant fell off, and anticipating that the prosecution would capitalise on that to show guilty conduct on the appellant, learned counsel submitted that the conduct of the appellant in the room at the most would show that the appellant had knowledge. According to learned counsel perhaps the appellant's mother concealed the cannabis under the bed with the appellant's knowledge and that the conduct of the appellant in trying to dispose of the cannabis was to protect the mother. Concluding his submission, learned counsel alternatively argued that at the highest the case against the appellant was one of possession of the dangerous drugs and not trafficking in the same.

[9] For reasons which we will explain shortly, we are unable to accept learned counsel's submission.

[10] As would be recalled, learned counsel contended that without the evidence of the appellant's mother, there was a gap in the prosecution's case in that exclusive possession of the proscribed drug was not proven by the prosecution. This point about the failure of the prosecution to prove exclusive possession of the proscribed drug because it did not call the appellant's mother to testify was raised before us for the first time. It was not raised before the learned trial judge in the court below. The recurrent issue of exclusive possession was also raised in *Public Prosecutor v Denish Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209. In that case the Federal Court held that it was inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession. Speaking for the court, Abdul Aziz Mohamad FCJ said at p 201 (MLJ) and p 217 (CLJ):

> *It is inappropriate to speak of possession of an article in criminal law as exclusive possession. One is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, — that is, 'exclusive' that a conviction is possible. When the learned trial judge said 'The accused sought to negative the proof of exclusive possession...', we take it that he meant no more than that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.*

The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v Reg* [1956] MLJ 28; [1955] 1 LNS 53:

> ... It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.
>
> Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

Thomson J, in *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237; [1956] 1 LNS 17, said that 'possession' for the purposes of criminal law involves possession itself which some authorities term 'custody' or 'control' — and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th Ed) at p 304, in which the exclusive element mentioned by Taylor J appears:

A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession. (Emphasis added.)

[11] We revert to the facts of this case. The evidence adduced by the prosecution clearly established that upon entering the house, SP6 saw the appellant wearing only a towel around his waist, standing in the living room. At that time the appellant's mother and a boy were also in the living room watching television. When SP6 shouted that he was a police officer, the appellant rushed into his room. In the room, the appellant bent down near a bed and took out 2 packages from underneath the bed. The appellant then got up and rushed out of the room holding the two packages in each hand. He was stopped in his track by SP6 and the police team and a struggle ensued in the course of which the towel worn by the appellant loosened and dropped off from his waist leaving him naked, and the two packages held by him in each of his hands dropped on the floor. The two packages contained two slabs of compact plant material which were confirmed by the chemist to contain 937g of cannabis. In the light of those facts it is clear to us (as it was clear to the learned trial judge) that the appellant had in his custody or under his control the two slabs of cannabis. On the question of knowledge of the drugs, proof of this is a matter of inference from the facts. The question is whether the inference must be drawn that the appellant knew that the two slabs consisted of cannabis. Upon considering the evidence that the appellant rushed into his room after SP6 introduced himself as a police officer, took out the two slabs from underneath the bed therein, dashed out of the room with two slabs in each his hands and then struggled with the police to resist arrest, we conclude that the learned trial judge was right in concluding that the appellant knew that the two slabs contained dangerous drugs. In our view, the evidence adduced by the prosecution established the nexus between the conduct of the accused which we have just set out and the two slabs of the proscribed drug which were in his custody and under his control. In other words, unlike in the case of *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1, his conduct was influenced by the fact in issue. The law relating to conduct was explained by the Federal Court in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717. In his judgment Augustine Paul FCJ said:

The law relating to evidence of conduct is thus patent. If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s 8 it is admissible. It must be observed that the degree of proof required to establish

evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. *Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s 9*. Such explanation must not be in their barest possible form, but with a reasonable fullness of detail and circumstance (see *R v Stephenson* (1904) 68 JP 524 ...

It is now appropriate to consider the rationale of the court in explaining the conduct of the accused in running away in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 which formed the basis of the submission of the appellant. In that case the drugs were found in a house occupied by the accused, his wife and a third person. The court considered the evidence of possible access to the house by others, and in distinguishing the case from *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840, held that the conduct of the accused in running away was equally consistent with him having been in a state of pure panic even though he did not offer any explanation himself. On the other hand in *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840 the accused was in the driver's seat of a stationary van with several others. There was drugs in the van. When the police approached the van all of them ran. The conduct of the accused in running away was held against him. The difference in both the cases is that in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 there was no evidence to show that the act of the accused in running away was influenced by any fact in issue or relevant fact within the meaning of s 8 in view of the possibility of access to the house by others. It is therefore not admissible on this ground as it is equivocal thereby justifying an inference in favour of the accused being drawn and ought to have been so ruled at an earlier stage of the trial. The case of *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 is therefore authority only to this extent. *On the other hand in Director of Public Prosecutions v Brooks* [1974] 2 All ER 840 *there was evidence to show that the drugs were in the physical custody and control of the accused and his conduct of running away thus comes, in the Malaysian context, within the meaning of s 8. It is therefore admissible and cannot be explained away by the court itself by offering an explanation which is consistent with the innocence of the accused. The explanation must be offered by the accused himself as required by s 9*. (Emphasis added.)

[12] Then, referring to the facts of the case before the Federal Court, His Lordship said:

In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. *The explanation for his reaction must therefore be offered by he himself as required by s 9. The court cannot, on its own, offer an explanation for his reaction*. However, in his defence the appellant did not offer any explanation at all for his reaction upon being approached by the police. It can therefore be validly used as evidence against him. (Emphasis added.)

[13] Returning to the instant appeal, it seemed to us that learned counsel conceded that the appellant had knowledge of the proscribed drugs. This occurred when learned counsel argued that the conduct of the appellant in the room at the house would at the most show that the appellant had knowledge. According to learned counsel, perhaps the appellant's mother concealed the cannabis under the bed with the appellant's knowledge and that the conduct of the appellant in trying to dispose of the cannabis was to protect the mother. With respect we are unable to agree. We find no sufficient basis for the court to make such a finding. Unlike in the case of *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 3 CLJ 1 where the girlfriend of the appellant in that case had access to the room where the heroin was found, in the instant appeal, there is nothing to connect the appellant's mother to the proscribed drugs other than the fact that she was in the living room with a boy watching television when the police burst into the house. When SP6 introduced himself as a police officer, there was no reaction from the mother or the boy. Instead, on the unshaken evidence of PW6 and PW8, when SP6 introduced himself as a police officer, it was the appellant who suddenly sprang into action. He rushed into his room, took out the two slabs from underneath the bed, dashed out of the room with the two slabs held in each of his hands and then struggled with the police who had blocked his path before being eventually overpowered and arrested. He was clearly in custody and control of the proscribed drugs and that he had knowledge of the same. Applying *Parlan bin Dadeh*, it was not for the court to provide the explanation for his conduct. The onus was on the appellant to explain his reactions upon being aware of the presence of the police in the house.

[14] In *Warner v Metropolitan Police Commission* [1968] 2 All ER 356, (which was referred to by the Federal Court in *Parlan bin Dadeh* and in its earlier judgment in *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337), Lord Morris said:

> *If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is* or contains then, ordinarily, I would suppose that there would not be possession. *If however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents*. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them. (Emphasis added.)

[15] In the light of the evidence adduced by the prosecution in this appeal, we are satisfied that the learned judge was right when he concluded that the appellant had possession of the proscribed drugs and since the drugs — cannabis was more than 200g, he was right in invoking the presumption of trafficking under s 37(da) of the DDA. In our judgment, the evidence against the appellant at the close of the prosecution was sufficient to convict him if he were to elect to remain silent (see *Balachandran v Public Prosecutor*). The learned trial judge was therefore right in holding that the prosecution had established a prima facie case of trafficking against the appellant, and calling upon him to enter on his defence.

[16] The appellant elected to give evidence on oath. In his evidence the appellant essentially repeated what he had put to SP6 in the trial in the court below. The appellant's evidence in substance is that on 2 August 2005 at about 7.15pm he arrived at the house from work. He went to his room which he had occupied alone since he was a small boy. He then went to the bathroom to bathe. After having his bath he re-entered his room. He said when he was in his room three men rushed in, held him and closed the room door. One of the men identified himself as a police officer. After a search in the room, the police team led by SP6 found the two packages from under his bed. The appellant told SP6 that the two packages belonged to SP7. According to the appellant, SP7 had come to his room the previous night to sleep as it was already too late for SP7 to go back and sleep in his mother's house. The appellant claimed that when SP7 arrived at the house that night, SP7 had with him a plastic bag. After inviting SP7 to come in, the appellant proceeded to the toilet, while the SP7 went to his room. After coming out of the toilet, the appellant entered his room. He saw SP7 lying on the bed in the room. The appellant said he did not see where SP7 put the plastic bag which he had with him earlier. According to the appellant, on 2 August 2005 SP7 left the house at about 6am. At about 4.30pm on 2 August 2005, SP7 telephoned the appellant and told the latter that he had left his thing in the latter's room. The appellant told SP7 that he would be back at the house at about 7.15pm. SP7 told the appellant that he wanted to come to take his thing which he had left in the appellant's room. The appellant told SP7 that he would telephone SP7 when he arrived at the house. The appellant denied knowledge of the contents of the the two packages found by the police from under his bed. He denied that the packages belonged to him. He disagreed that the two packages were not SP7's.

[17] The appellant also called his mother, Halijah Wadud ('SD2') to give evidence of his behalf. SD2 denied any knowledge of the drugs found in the appelant's room (shown in photograph P4A–B). Obviously, SD2 was called to testify to lend credence to the appellant's defence that the proscribed drugs belonged to SP7 who had left them in the appellant's room on 1 August 2005. However, the learned trial judge did not find SD2 to be credible in her evidence

in so far as it related to her knowledge about SP7, let alone about the appellant's claim that SP7 slept in his room on 1 August 2005. We do not think the learned trial judge misdirected himself in arriving at that finding, for, having considered the evidence of SD2 in the appeal record, it is clear to us that SD2 did not know whether SP7 had slept in her house on 1 August 2005, and that actually SD2 did not see him.

[18] It is clear from the appeal record that the appellant's version was diametrically opposed to the version given by the prosecution witnesses in court. As opposed to the prosecution's case according to the evidence given by SP6 and SP8, the appellant claimed that the two slabs of cannabis found by the police under his bed were not his and that they belonged to SP7 who had inadvertently left them when he slept in the appellant's room on 1 August 2005. That was the appellant's defence. So, SP7, and the role played by him and the nexus between him and the proscribed drugs was central to the appellant's defence. As we have said earlier in this judgment, this defence was put to SP6 when he was cross-examined. Surprisingly however, when SP7, (who testified after PW6 completed his evidence) was cross-examined, that defence was not put to him. SP7 was not asked about the two slabs of compact plant material found under the bed in the appellant's room. It was not put to SP7 that the two slabs belonged to him and that he had left them there when he came and slept in the appellant's room on 1 August 2005. SP7 was also not challenged on his evidence that he went to the appellant's house on 2 August 2005 pursuant to the appellant's phone call about a job opportunity. The importance of putting the appellant's defence to SP7 cannot be overemphasised. In *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 at p 218 (MLJ) and p 718 (CLJ), the Federal Court explained the purpose of the defence having to put its case to the crucial witness for the prosecution:

> ... in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, *and thus avoid the adverse comment, that the defence is a recent invention in other words, 'kept up its sleeve', as it were — and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence*. However, failure on the part of the defence to put its case as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.

[19] The Federal Court made it clear that although a court may view with suspicion a defence which was not put to the appropriate prosecution witness who might have personal knowledge of the point of issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it. That,

in our view was the approach which the learned trial judge had adopted in evaluating the evidence led by the appellant in his defence. This is clear when he said in his judgment:

> Looking at the whole evidence led by the defence, this OKT had pegged his case on the contention that the seized cannabis was not his and that it had belonged to his friend who had inadvertently left it behind after sleeping the night in his room. In considering the defence, I am entitled to look at the whole evidence led in this court including the cross-examination of the prosecution witnesses. In this case the so-called friend of the OKT's, Yusri (SP7) was called to the stand by the prosecution and it is worth noting that the defence did not cross-examine him on the very cannabis that was contended by the OKT to have belonged to him. The furthest that the defence had cross-examined had been to put it to Yusri that he had slept over in his room the night previous to his arrest by the police. This was denied by Yusri who had also testified that he had never been to this OKT's house and nor had he slept over in the OKT's room. Although the OKT had put it to C/Insp Loi (SP4) that the two packages that were found under his bed had belonged to Yusri (SP7) and which was denied by SP7, yet SP7 was never confronted with the photographs marked as P4A–B and he had not confronted SP7 with P7D and P7F during the time that SP7 was being cross-examined by learned counsel. The law is clear on this issue and it is this failure to cross-examine a crucial witness on a material matter must mean that his testimony must be deemed as being accepted (*Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 per Justice Azlan Shah CJ). This witness (SP7) was confronted by the prosecution with the cannabis in this court and he had denied having anything to do with the said cannabis. During cross-examination of this witness by learned counsel, this critical fact of denial by the witness of him having any knowledge of the cannabis was not challenged by the defence. Why did the OKT not confront SP7 with the same bold assertion which was directed at SP6 by learned counsel when SP7 was available to be cross-examined on that crucial point? In this kind of situation, the law is clear and it was succinctly addressed in the case of *AEG Carapiet*, where Justice Mukerji J had said that the duty incumbent on counsel to cross-examine on issues of material significance in his client's case was not only a mere rule of procedure, but more importantly, it was a rule rooted in justice and fairplay, designed as such so as not to lead to surprises in a trial. As such it would be very difficult for this court to attach much weight to that kind of a defence. But still this court must weigh such evidence, however weak it may be in order to see whether it had created a doubt on the issue of actual possession that ad been established against him or rebut the presumption of trafficking against him (see the case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 507 per Edgar Joseph Jr SCJ). As a result, I find that the OKT had failed to raise a reasonable doubt on the issue of *possession*.
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> Case, it is this court's finding that the evidence led by the defence could not rebut the said presumption of trafficking. His version that the drugs had belonged to SP7 had been denied by the latter. In fact, the OKT did not confront the SP7 on this issue when SP7 was on the stand. This had weakened the value of the OKT's assertion on that issue. To my mind, the assertion by the OKT that the drugs had belonged to SP7 was a bare assertion and as such it could not dislodge the burden on him to rebut on the balance of probabilities. I also found that he had failed to rebut the presumption on the balance of probabilities. It is my finding that his defence had been one of

denial of having been caught with the cannabis. The manner in which the two slabs of cannabis had been wrapped up and packed and their total amount would appear to suggest rather strongly that they were meant for trafficking by this OKT. It was never suggested by the defence that the two slabs were meant for his own use or consumption. Indeed, the very nature of his defence would not allow for such an averment to surface or emanate from the OKT. That would be inconsistent with the professed line of total denial as his defence.

[20] We detect no misdirection on the part of the learned trial judge in coming to the aforesaid conclusion.

[21] We find that the learned trial judge had adequately considered the defence of the appellant in the light of the evidence adduced by the prosecution through its witnesses and concluded that the prosecution had proved its case against the appellant beyond reasonable doubt. The conclusion of the learned judge was based on findings of fact which in turn depends on his finding on the credibility or otherwise of the prosecution witnesses particularly, SP6, SP7 and SP8, and of the appellant as well as his witnesses. In accordance with settled authorities, this court will be reluctant to interfere with the findings of the learned judge as primary trier of facts (see *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644; *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 275). Having carefully scrutinised the evidence on record and having carefully examined the judgment of the learned trial judge, we do not detect any appealable error or misdirection.

[22] We are entirely satisfied that the conviction of the appellant is safe. In the result the appeal is dismissed. The conviction and sentence imposed on the appellant are affirmed.

Appeal dismissed.

Reported by Andrew Christopher Simon